United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

74-1693
74-1704

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In The

UNITED STATES COURT OF APPEALS

For The Second Circuit

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

vs.

TILNEY & COMPANY,
FREDERICK TILNEY,

Defendants-Appellants,

—and—

I. ALAN HARRIS (Cross-Appellant);
JOSEPH C. HOGAN;

Appellee.

On Petition to Review and Set Aside Decision of November 14, 1975, With Suggestion That Rehearing In Banc is Appropriate

PETITION FOR REHEARING IN BANC

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PETITION FOR REHEARING IN BANC

Tilney & Company and Frederick Tilney respectfully petition this Court to grant a rehearing with respect to its decision of November 14, 1975, affirming orders of the District Court. Petitioners suggest that it is appropriate that the rehearing be held in banc pursuant to Rule 38(b).

The Negligence and Incompetence of the Receivers

By its decision of November 14, 1975, this Court has given its approval to the administration of an estate which

should have been completed in two years or less, but which, through the negligence of the receivers, continued for a period of more than six years. The receivers were appointed on December 18, 1967, and the amended order of termination was entered by the District Court on April 19, 1974. When the receivership commenced, Tilney was in good financial condition with assets more than ample to pay off all creditors and all administration expenses. Tilney, however, has become the victim of a patronage system which has left him a destitute and destroyed man. The outrageous delays in winding up the estate have all but wiped him out.

The total non-collateralized claims of creditors came to $265,000, as against which fees of $184,572 were awarded to the receivers and their agents. The creditors and receivers and their attorneys have all been paid in full, but the few assets remaining to Tilney are still in the hands of the receiver after a period of eight years.

The record is devoid of any legitimate excuse for the incredible delays in winding up this estate. It should have been wound up by the end of 1969 at the latest. It is respectfully submitted that this Court has failed to give proper consideration to the following incontravertible facts:

(1) A substantial portion of the receiver Hogan's brief (pp. 14-40) is devoted to describing the transactions handled by

the receivers. However, a reading of those pages reveals that every single one of these transactions upon which the receivers base their claim for fees was either in 1968 or 1969, the great majority of them in 1968.

(2) In July 1969, the Court stated that it expected the estate to be liquidated no later than the first of the year.

(3) The record is replete with directions over the years by the Court to the receivers to move with speed in winding up the estate but those directions were never complied with. As early as February 1968, when Tilney complained that delays were wasting estate assets, the Court agreed with him that liquidation should be carried out with dispatch.

(4) During the 23-month period beginning on January 1, 1971, no liquidation of any assets took place at all. The bulk of the liquidation had been completed ($840,274) by July 16, 1969, and from that time to December 31, 1970, liquidation totaled only $152,504.

(5) The SEC repeatedly complained of the receivers' delay and in its final report to the Court stated that, "an unduly long delay has occurred to bringing this matter to completion."

(6) Promises by the receiver to submit applications for allowances by specified dates were not kept. In one instance, the commitment to file was not kept at all and in another the application was filed four months after the promised deadline.

(7) Although on November 27, 1972 (after all of the creditors had been paid), the Court directed the receiver to wind up the estate with "all haste and expedition," he did not move to terminate the receivership until September 11, 1973.

(8) Claim forms were not even mailed to the creditors until one year after the receivers' appointment. The creditors were either misled or kept in the dark as to the progress of the estate, the SEC describing their communications as "anguished cries for redress."

(9) Receiver Harris "came early to the conclusion that the receivership estates were solvent that all just creditors and claimants would be paid in full even after the payment of all administrative expenses."

(10) After payment of all creditor claims ($265,000), plus interest ($39,000) and administrative fees ($190,000), receiver Hogan by his own estimate at the termination of the receivership had on hand for delivery to Tilney assets valued at $300,000.

No satisfactory explanation has been given on this appeal as to why this estate could not and should not have been wound up by the end of 1969, as the Court and the SEC fully expected it to be.

It is submitted that the Court has not given proper consideration to the provisions of Section 2001 and 2004 of

28 U.S.C. These statutes very specifically outline the procedures to be followed by receivers concerning the sale of personalty. There is no question but that the receivers here did not obey the mandates of these sections. Although these statutes provide for an alternate "procedure" if ordered by the Court, no alternate procedure was ever requested or authorized by the Court. Furthermore, as pointed out in Tanzer v. Huffines (412 Fed 2d 221 (3rd Cir 1969)), the District Court "should not order otherwise except under extraordinary circumstances" (p. 222). No such "extraordinary circumstances" existed here.

Harris' Misfeasance

Concerning the transaction which precipitated Harris' removal as co-receiver, namely, the acquisition by him of one hundred shares of Waddington stock free of charge from a friend to whom he had sold it on behalf of the estate, it is submitted that the Court did not give adquate consideration to the following facts which have not been contraverted:

(1) The District Court was not aware that Harris negotiated the sale of the Waddington Bank stock to a friend.

(2) Co-receiver Hogan did not know that Harris had become a director of the bank and had acquired ownership of one hundred shares of the stock until told of it by Tilney.

(3) The SEC described the transaction as "tainted."

(4) The SEC and the Court both were of the opinion that the sale should be rescinded regardless of any question of value.

(5) Harris' claim that the stock was issued to him nominally so that he could qualify as a director flies in the face of Section 7001 of the New York Banking Law, which requires a bank director to own stock "in his own right."

Great emphasis is placed in receiver Harris' brief on the fact that the Waddington stock brought in the same price on a resale as it had on the original sale. Harris, as did the Court below, seeks to blame Tilney for the resale. The Court stated that it was "euchred" into the sale. However, the unquestioned fact is that the SEC found the original sale to be "tainted." The Court on the record below agreed with the SEC that the original sale should be rescinded because of this, regardless of value. The issue was thus not one of value, but of taint and the Court fully concurred in this.

Furthermore, it should be pointed out that prior to the resale, Tilney requested the Court to have an appraisal made of the stock but this was not done. That the resale brought in the same price as the original sale may be due to the fact that (a) Harris in open court had stated that the bank was in terrible condition, and/or (b) market conditions had changed during the year that had elapsed since the original sale.

Serious doubt must be cast on Harris' explanation as to how he came to acquire the one hundred shares of the Waddington stock without paying for the same. If Harris had acquired this stock in order to help his friend unravel the affairs of the Waddington Bank as he claims, it is very surprising that he would not have so informed his co-receiver. The record is silent as to why receiver Hogan was not informed of Harris' activities in this regard. Furthermore, if Harris' story is to be believed, he was in clear violation of Section 7001 of the New York Banking Law. In any event, his conduct was such as to constitute a clear breach of fiduciary duty and such as to preclude the award of any fee to him in these proceedings.

Substitution of Attorneys

As a result of the District Court's failure to permit Tilney to substitute attorneys and thereafter to represent himself, Tilney has been deprived of his day in Court on the surcharge application. The receivers in their briefs and oral argument have sought to use the fact that Cadwalader Wickersham & Taft would not represent Tilney on this issue as a basis for denying him relief in this Court. It goes without saying that the respect and prestige, fully deserved, enjoyed by the Cadwalader firm should not be a basis for depriving Tilney of his rights. Apart from this, however, the record in the District Court shows that the Cadwalader firm categorically

rejected a contention by the receiver that the firm had disapproved of the contents of Tilney's surcharge affidavit. Pointing out that it had differences of opinion on one broad aspect of the matter, it stated that it had taken no position one way or another on the details of the surcharge affidavit (p. 1030, Appendix). As to the contention that the Cadwalader firm had approved of the accounting, here again the Cadwalader firm made it clear that its approval was limited to a "matter of arithmetic" and that its approval of the receivers' application was not to be construed "as an approval of all of the actions which the receiver and the ex-receiver had taken through the Court" (pp. 1321-22, Appendix).

The District Court was clearly in error in stating in its opinion of February 21, 1974, that Tilney's surcharge affidavit had been considered and rejected by the Court in its previous opinion, dated October 19, 1972, dealing with the fee application. In April 1972, the Court refused to accept Tilney's surcharge affidavit because it was not accompanied by a memorandum of law, and stated that even if it were filed appropriately (which was subsequently done) it would not be considered on the question of fees. In the opinion of October 19, 1972, concerning fees, no mention is made of Tilney's surcharge affidavit. In the opinion of February 21, 1974, the Court refers to the surcharge affidavit and states that it did not consider his application before because it was premature "until the

receivers presented their accounting" (which was not filed until October 1973). The District Court, is therefore, clearly wrong in stating that it had considered and rejected Tilney's surcharge claims.

The receivers have never been required to respond to Tilney's surcharge claims. Tilney has had no opportunity whatsoever to present evidence concerning these claims. On this vitally important issue, he has been without counsel and even denied the right to represent himself. The doors of the Courts have been closed to him.

Conclusion

For the foregoing reasons, we respectfully submit that this petition for rehearing in banc should be granted.

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